No. 80-255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGIA POWER COMPANY,
Petitioner,

vs.

138.30 ACRES OF LAND and
MILDRED B. SANDERS, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

When a licensee exercises a federal power of eminent domain as authorized by §21 of the Federal Power Act, should just compensation be determined by applying uniform national law or by applying, as federal law, the law of the state where the property is located?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents MILDRED B. SANDERS, BRANNEN McCARTHY SANDERS, CARL WALTON SANDERS, NELLIE W. LARMAN, CLIFFORD H. DYER, JR., J. P. DYER, III, and GEORGE M. DYER respectfully pray that a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 27, 1980, be denied.

REASONS FOR DENYING THE PETITION

(1) The issue raised does not present an important question of federal law in need of resolution by this Court.

In recasting the question presented in this matter, the

Respondents have illustrated that no important issue of federal law is presented in this case and, thus, that there is no reason which would compel this Court to grant the Petition for Writ of Certiorari.

Petitioner characterizes the question here as a constitutional one. It states the controversy as one between the Fifth Amendment of the United States Constitution and the law of the forum state. That simply is not the focus of this matter. Of course, the Fifth Amendment is the ultimate arbiter in federal condemnation matters, declaring that no property may be taken for public purposes without just compensation. The issue here, however, is one of the choice of what law to apply in determining just compensation in a particular circumstance.

The Petitioner is taking the property of the Respondents as a licensee of the Federal Energy Regulatory Commission (formerly the Federal Power Commission) pursuant to the power set forth in §21 of the Federal Power Act, 16 U.S.C. §814 (1976). While §21 permits the use of eminent domain powers by the licensee to obtain private property necessary to a project, the statute does not provide a formula for determining "just compensation". Accordingly, the District Court, and the Fifth Circuit on each of the three occasions it has reviewed the matter in this and related cases, viewed the issue as a choice of law question.[1] In the absence of a standard for determining just compensation in the statute itself, a

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[1] The *en banc* opinion of the Court of Appeals is reported at 617 F.2d 1112 (5th Cir. 1980). The panel opinion of the Fifth Circuit reviewed *en banc* is reported at 596 F.2d 644 (5th Cir. 1979). The prior opinion of that Court, which was overruled by the *en banc* decision, is reported at 563 F.2d 1178 (5th Cir. 1977). While the *en banc* court split 17 to 4 on its ultimate decision, both the majority and the dissent approached the issue as a choice of law question.

court must determine whether such compensation should be determined under federal or state law. If federal law is chosen, a court must further determine the federal law standards which are appropriate.

In this context, the Fifth Circuit properly viewed its task as one of interstitial law-making. In doing so, the Court carefully applied the well-reasoned analysis of this Court first announced in *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) and continued through *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). The Court's studious review led it to the proper conclusion that federal law should be applied since the Petitioner's condemnation powers arise from a federal source and, therefore, represent the exercise of a constitutional function or power.

Having decided that a federal rule should apply, the Fifth Circuit then addressed the larger question of whether the federal rule should be determined by federal common law or state law. In making its determination, the Fifth Circuit carefully reviewed the federal and local interests involved as well as the effects of applying state law rather than uniform federal law in such cases. Finding no compelling reason to displace state law, the Court decided that considerations of federalism dictated the conclusion that the law of the state where the condemned property is located should be adopted as the appropriate federal rule for determining the measure of compensation when a licensee exercises the power of eminent domain pursuant to §21 of the Federal Power Act.

Clearly, the Petitioner is incorrect in suggesting that this case is one of constitutional interpretation. Indeed, its argument is belied by the Petition itself. In presenting its argument that the issue before the appellate court was

a constitutional one, the Petitioner cites *Monongahela Navigation Company v. United States*, 148 U.S. 312 (1893), and quotes from that case on pages 7 and 8 of its Petition. That case, and, indeed, the precise quote relied upon by the Petitioner, demonstrate that determining the scope of just compensation under the Fifth Amendment is a judicial function. The Fifth Circuit has exercised that function here, deciding that a federal rule must be adopted and that in the absence of an overriding federal interest sufficient to overcome the principles of federalism, state law is to supply the federal rule.

Beyond its argument that the issue is a constitutional one (with the unarticulated argument that such a view would make some difference), the Petitioner makes two additional arguments to suggest that this case is of sufficient import to warrant this Court's review. First, the Petitioner states that the appellate court's ruling "will have an adverse impact on the development of federally licensed water power projects and the costs to consumers of power produced by those projects." (see Petition at page 8). Thus, the Petitioner continues with the argument, dissected by the Fifth Circuit, that there is an overriding federal interest compelling the adoption of uniform federal rules. Petitioner overlooks two important points. First, as a Federal Power Commission licensee, the Petitioner is involved in this project only because the federal government has made the determination that the United States should *not* develop the project itself. *See* 16 U.S.C. §800(b).

With that in mind, the second missing fact, the relationship of these parties, has great significance. As Judge Fay pointed out in his concurring opinion below:

"Trimmed to the bone, the facts of this case are that

> a private, Georgia utility company desires privately-owned Georgia land from Georgia citizens for a private hydroelectric power and recreation project in Georgia to supply power to Georgia citizens and to provide profit to private investors."

617 F.2d at 1124. Those facts underscore the total absence of any compelling federal interest sufficient to displace state law as the appropriate rule of decision.

Petitioner's last argument is equally unpersuasive. Petitioner states that the choice of law issue will recur, citing some thirty-nine statutes which provide condemnation power to various federal agencies. (see Petition at A105-A108). As a quick review of those statutes will demonstrate, all but three involve the exercise of eminent domain power directly by federal departments, agencies, or commissions. Of the three remaining statutes, one is the provision of the Federal Power Act under consideration here and another is a virtually identical statute under the Natural Gas Act, 15 U.S.C. §717 (1980). The only other cited statute involving the exercise of federal condemnation power by private citizens is 43 U.S.C. §942-3 (1980), which provides for obtaining a right-of-way over privately-held lands in Alaska. This statute has been repealed for many practical purposes, provides guidelines for the payment of compensation and, in any event, has rather limited application. Thus, the Petitioner's suggestion of the possibility that this issue will occur again, so as to imply the need for uniformity, is greatly overstated. Indeed, the various eminent domain statutes listed are irrelevant to the issues here.

It is important to note that this Court has previously determined that the precise issue in this matter is not in need of resolution by this Court. The exact question presented here was before this Court by way of a petition

for writ of certiorari in the case of *Boswell v. Georgia Power Company*, 440 U.S. 907 (1979). The petition for certiorari in that case was filed by landowners similarly situated to the Respondents here and arose out of the Fifth Circuit panel decision expressly overruled (in part) by the *en banc* decision of the Fifth Circuit which is the subject of this Petition. See *Georgia Power Company v. 54.20 Acres of Land, et al.*, 563 F.2d 1178 (5th Cir. 1977).

Of course, this Court denied that petition for certiorari. Since that time, the only case development relevant to the question presented in this matter is the Fifth Circuit's *en banc* opinion which is the focus of the present Petition. Indeed, the Fifth Circuit's *en banc* decision created unanimity in the Courts of Appeal by bringing the Fifth Circuit in line with the decisions of the Fourth, Eighth, and Ninth Circuit Courts of Appeals. Accordingly, less reason to grant a petition for certiorari exists today than in 1979 when this Court denied the petition for certiorari in *Boswell*.

(2) The decision of the Court of Appeals is not in conflict with cases from other circuits or from this Court and is distinguishable from the cases cited by the Petitioner as conflicting.

Petitioner suggests that the decision of the Fifth Circuit conflicts with *United States v. Miller*, 317 U.S. 369 (1943). The holding of *Miller* is distinguishable from the instant case for several obvious reasons. First, the United States, and not a private corporation, was the condemnor in *Miller*. The Fifth Circuit noted this basic distinction. The distinction is important because, as the Court of Appeals noted, a Federal Power Commission licensee, unlike the United States, often acts "on a local scale on projects thought to be of insufficient dimension to warrant the

assertion of national power." 617 F.2d at 1118, citing *Public Utility District No. 1 of Pend Orielle Co. v. City of Seattle*, 382 F.2d 666, at 669 (9th Cir.) *cert. denied*, 396 U.S. 803 (1969). Indeed, under the Federal Power Act, a licensee can proceed only after the United States determines that the project does not warrant its direct participation. See 16 U.S.C. §800(b). Moreover, in *Miller*, the United States was condemning property under the authority of 40 U.S.C. §§257, 258 and 33 U.S.C. §591— statutes which provide condemnation authority exercisable only by officers of the United States. Lastly, the *Miller* decision predates *Clearfield Trust*, *supra*, and, in any event, is clearly premised on a rationale which would be applicable only in cases where the necessity of a uniform national law was apparent. None exists here.

The Petitioner also suggests that the decision of the Court of Appeals conflicts with *Richmond Elks Hall Association v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977). That case involved an inverse condemnation action grounded solely on bare Fifth Amendment protections without any statutory base. It is clearly distinguishable from the instant case which involves determination of the rules of decision to be applied under an incomplete statutory scheme.

Indeed, the Petitioner has cited no cases decided by either a Court of Appeals or this Court which conflict with the Fifth Circuit's *en banc* decision on the precise issue before that court. Indeed, in overruling the prior panel decision, the Fifth Circuit's *en banc* opinion brought that Circuit in line with the decisions of the Courts of Appeals of the Fourth, Eighth and Ninth Circuits. *See Feltz v. Central Nebraska Public Power and Irrigation Dist.*, 124 F.2d 578 (8th Cir. 1942); *Oakland Club v. South Caro-*

lina Public Service Authority, 110 F.2d 84 (4th Cir. 1940); *Public Utility District No. 1 of Pend Orielle Co. v. City of Seattle*, 382 F.2d 666 (9th Cir. 1967). The Fifth Circuit's *en banc* decision is premised with great care on the detailed analysis of the decisions of this Court. *See Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979); *United States v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580 (1973); *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966); *United States v. Standard Oil Company of California*, 332 U.S. 301 (1947); *Bank of America National Trust & Savings Association v. Parnell*, 352 U.S. 29 (1956); *Miree v. DeKalb County, Georgia*, 433 U.S. 25 (1977); *United States v. Yazell*, 382 U.S. 341 (1966). In short, there is simply no room for argument that the Fifth Circuit's *en banc* decision conflicts with any federal appellate decision on the same subject matter.

CONCLUSION

It is readily apparent that no question of constitutional interpretation is involved and no conflicting decisions appear. The question presented is a traditional choice of law issue which was correctly determined by the Fifth Circuit. No special or important reason for the granting of certiorari appearing, the Petition should be denied.

Respectfully submitted,

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